No. 3953.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

McCLINTIC-MARSHALL Co., a corporation, E. E. DAVIS & Co., a corporation, and FAR WEST CLAY COMPANY, a corporation,

Cross-Appellants,

vs.

ANN DAVIS and R. T. DAVIS, as executors of the Estate of R. T. DAVIS, Deceased, R. T. DAVIS and others, co-partners doing business under the name and style of TACOMA MILLWORK SUPPLY COMPANY,

Appellees.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

Brief of Cross-Appellants

HAYDEN, LANGHORN & METZGER,
and R. S. HOLT,
Tacoma Bldg., Tacoma, Wn.

JAMES W. REYNOLDS,
PETERS & POWELL,
of Seattle, Wn.

Solicitors for Cross-Appellants.

THE IVY PRESS, SEATTLE

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Brief of Cross-Appellants

STATEMENT.

This is a cross-appeal by the above named appellants from that part of the decree rendered and entered in the United States District Court for the Western District of Washington, Southern Division, on the 2nd day of May, 1922, in a suit brought by McClintic-Marshall Co., plaintiff, against the Scandinavian-American Building Co., a corporation, Ann

Davis and R. T. Davis, Jr., as executors, R. T. Davis and others as Tacoma Millwork Supply Company and a number of other lien claimants, defendants, seeking to recover mechanic's liens upon a certain building under construction in the City of Tacoma.

A consolidated record involving a number of appeals from this decree is on file herein under the title of *Forbes P. Haskell as receiver of Scandinavian-American Building Co., et al, appellants, vs. McClintic-Marshall Co., et al, appellees,* etc. Cause No. 3953, to which record reference is herein made.

By the terms of this decree, McClintic-Marshall Co. was given a judgment in the sum of $174,000 and more with interest and costs and a material man's lien to secure the same upon the real property involved, (Record, page 507); the Far West Clay Company was given a judgment and lien upon said real property for material furnished in the sum of $22,000 and over, with interest and costs, (Record, page 500); E. E. Davis & Co. was given a contractor's lien upon said real property for doing the steel construction in the sum of $30,000 and over, (Record, page 511); and The Tacoma Millwork Supply Company, Appellees herein, were given a personal judgment against the Scandinavian-American Building Company for damages in breach of

contract for furnishing material in the sum of $52,-000 and over, with interest and certain costs and denied a lien for this judgment and was given a material man's lien in the sum of $4,657.50, plus attorney's fees, interest and costs.

By this same decree many other lien claims were determined, some allowed, some rejected, and personal judgments rendered. It is from the portion of the above decree giving the Tacoma Millwork Supply Company a mechanic's lien for this amount of $4,657.50 and costs, or allowing it a mechanic's lien upon the property in any amount, that this appeal is taken, as prejudicing the lien rights under said decree of two of the cross-appellants as of co-ordinate rank and of the E. E. Davis & Co., the contractor, of subordinate rank to the Appellees, substantially upon the ground as will be more specifically pointed out in the assignment of errors, that the several contracts under which the Appellees claimed, contained an express waiver of mechanic's lien, that the appellees had never rescinded the contracts, but were suing on the contracts, and claiming a profit under the contracts and consequently could not repudiate the lien waiver and recover on the contracts, or, having clung to the contracts throughout, could not recover on a *quantum meruit*.

The Appellees upon their first appearance by answer and cross-complaint January 19, 1921 (Record, pages 166 to 179) claim that "they entered into written contracts with defendant, Scandinavian-American Building Co., true copies of which are hereto attached and marked Exhibits A, B and C," exhibit A comprising contract for the delivery of general mill work for the building to be erected upon the property hereinbefore described; exhibit B comprising a contract for the mill work with respect to bank fixtures, and exhibit C having reference to the erection of the mill work hereinbefore referred to as distinguished from its manufacture (page 171, paragraph 12). "That thereafter and in accordance with the terms of said main or manufacturing contract, namely, exhibit A, and said bank fixtures contract, namely, exhibit B, your cross-appellants, upon the 28th day of February, 1920, and January 17, 1921, manufactured and delivered to said Scandinavian-American Building Company, a total of manufactured material especially designed for the building to be erected and being erected upon the premises hereinbefore described and not otherwise useable, a total in value of $44,548.41, being the *reasonable* and *agreed value* of said goods.

"That your cross-complainants are and were at all times ready to fully complete said contract and that a reasonable profit on the remaining portion of contracts A and B is and would be $3,000 * * * "

Then follow allegations of the filing of Appellees' liens.

(XVI, page 173). "That the contract, exhibit C, being a contract for the erection of the two several characters of millwork hereinbefore referred to as being manufactured under exhibits A and B attached hereto and made a part hereof, was entered into contemporaneously with the said other or remaining contracts by these, your cross-complainants, *and formed and is a part of the consideration entering into the two remaining contracts and also are one and the same transaction, each contract being a consideration for the entry into the other,* (wherever italics appear in this brief they are our own) and that a reasonable *profit* to be derived out of said contract known as exhibit C hereto attached, being the erection contract, would be and is the sum of $10,500 * * * ." Then follow allegations of lien filed for this amount.

In their prayer Appellees ask the following, (Record, page 176): "That your cross-complainants may have a judgment against the defendant, Scandinavian-American Building Company, for the sum of $44,548.41, plus $3,000" (which latter was a profit) "with interest thereon at the rate of six per cent per annum from date hereof; for the sum of $10,500 with interest at seven per cent," and for an attorney's fee and that the plaintiff might be

adjudged to have a lien upon the premises for the total amount of the claim, $48,048.41, with interest and attorneys' fees, (page 177).

At pages 190 to 191 is the contract set out by Appellees for furnishing the millwork of this building at an agreed price of $65,000, in which contract appears the following, (Article XIV, page 197):

"And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all claims against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract."

Exhibit C, the contract for installing the manufactured material, is shown at pages 201 to 209, which was to furnish "All of the interior millwork to be erected complete, according to the plans and specifications, for the sum of $30,000. Also to furnish complete the bucks as per details for the sum of $1,266.00, all according to estimates furnished by the party of the second part, etc." This contract contains the same section XIV, waiving lien right, (page 208). The appellees on the 7th day of April, 1921, filed an amended answer and supplemental cross-complaint shown on pages 213 to 241, wherein they again refer to contracts A, B and C and claim as follows, (page 218, par. XIII): "That thereafter and in accordance with the terms of said main or manufacturing contract, namely, exhibit A, and said bank fixtures contract, namely, exhibit B, your

cross-complainants between the 28th day of February, 1920, and January 17, 1921, manufactured and delivered to the Scandinavian-American Building Company, a total of manufactured material especially designed for the building to be erected and being erected upon the premises hereinbefore described, and not otherwise useable, and said value being $60,512.92, being the reasonable and agreed value of said goods.

"That your cross-complainants are and were at all times ready to fully complete said contract and that a reasonable profit on the remaining portion of contract A and B is and would be $1,000.00. Then follows an allegation of their having filed an amended lien covering this on April 7, 1921.

(Paragraph XVI, page 221): "That the contract, exhibit C, being the contract for the erection of the two several characters of millwork hereinbefore referred to as being manufactured under exhibits A and B attached hereto and made a part hereof, was entered into contemporaneously with the said other or remaining contracts by these, your cross-complainants, and form and is a part of the consideration entering into the two remaining contracts, and was all one and the same transaction, each contract being a consideration for the entry into the other, and that a reasonable profit still to be derived out of said contract known as exhibit C hereto attached, being the erection contract, would be and is the sum of $6,000, etc." (setting out the filing of an amended lien for this claim as of April 7, 1921).

At page 222 is set forth the following: "That in addition to the foregoing, your cross-complainants, under the terms and conditions of the contracts herein set forth, and pursuant to the usual method

of handling said work, did a great deal of work upon said manufactured products by way of assembling the various parts, which work is of the reasonable value of $6,043.00,'' and that the cross-complainants had filed on the 7th day of April, 1921, an amended lien covering their entire claims on all these contracts.

Attached to this supplemental cross-bill as exhibit A-1 (pages 236 to 238) is a schedule of material manufactured under contract A showing the cost price of this material as far as completed only, aggregating the sum of $58,555.92.

At page 239 is exhibit B, showing the contract for door bucks at the agred price of $1266.00.

Also upon the same page and the next succeeding one is exhibit C-1, showing the material manufactured for the banking room frames at the agreed price of $1957.00.

On page 241 is exhibit G-1, which is a summary of the claims of the cross-complainants under all the contracts, showing the following footings:

Balance due	$62,507.83
Profit entitled to on balance of labor contract	6,000.00
Profit entitled to on balance of main contract	1,000.00
	$62,507.83

Evidently this total is an error and should be $69,507.83.

At pages 779 to 786 of the record appear as introduced by the Appellees, the original notices of lien filed by them in January, 1921, and the amended lien filed in April, 1921, wherefrom it appears that they are still claiming under the contracts and for profits at the contract price.

The following occurred during the production of proofs by the Appellees, (page 669):

Question (By Mr. Flick, Counsel for Appellees): "Well, will you tell his Honor, please, Mr. Davis, the character of the work, just briefly, the special character that went into this building."

(Mr. Oakley, Counsel for the Receiver): "At this time the Receiver objects to the introduction of any testimony tending to sustain a lien claim in this action for the reason that in each of these three contracts the following provision is set forth: 'Article XIV. And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all rights to any mechanic's claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.'

"That provision is found in each of the three contracts, and for that reason we maintain that the parties are estopped from proceeding to claim or attempting to claim any liens."

The Court: "I will have to hear the evidence

before I would know what the ruling would be, so that I will hold the objection as premature and will overrule it."

Mr. Oakley: "I am raising the question at this point as I do not wish to waive any rights." (Note an exception to the ruling of the court).

The Court: "Allowed." (page 670).

Mr. Holt: "Let it be understood that objections made by Mr. Oakley are made in behalf of all the other defending attorneys and will be so considered."

The Court: "All objections will be made in behalf of all claimants unless otherwise stated or indicated." (page 671).

"Referring to exhibit 154 the amounts set opposite each one of the separate lines represent the reasonable value of the material and labor entering into that material (S. F. p. 380).

"That portion designated on exhibit 154 as exhibit A-1 and exhibit B-1, that is the door buck contract and is incorporated in one of these contracts (S. F. p. 380). The next sheet is C-1 and that represents the bank quarters, which is a separate contract and amounts to $1759.00, the reasonable value for the material."

Mr. Oakley objects on the ground that these cross-complainants are relying on the contract and that reasonable prices did not prevail.

Mr. Flick: "We are not relying on the contract, Mr. Oakley."

The Court: "Objection was overruled."

(Page 693) Mr. Flick: "The last page of exhibit 154 details the various contracts and the profit claimed under those contracts, such as the door buck contract, the erection and labor contract, the open

contract and bonds, and the profit on erection * * *'' (S. F. p. 426).

Exhibit 154 referred to by Mr. Flick will be found at pages 766 to 771 of the record and G-1, the final summary at page 773, from which it appears that Appellees are still claiming for the contract and the profit solely under three of the contracts and both a reasonable value and a profit at the contract price under contract A.

In the argument of Appellees Counsel before the trial court he contended—(We quote from Mr. Flick's Brief under stipulation of Counsel permitting such reference, Record, p. 434).

Says Mr. Flick: ''We therefore respectfully submit to your Honor that a total profit $12,843.10 would not be out of the way, but in truth they are only asking $11,300.''

Again: ''The exhibits clearly portray the prices which, as the Evidence shows are practically the correct price. The Exhibits also show the anticipated profits, so that there is now nothing to be added, if your Honor please, to the pleadings or to the exhibits mathematically portraying this lienor's claim, nor in fact is anything lacking in proof.'' And again: ''If Mr. Metzger'' (opposing Counsel) ''says that we are suing on contract, and cannot do this, we can answer him that the reasonable price and reasonable profits are stated. If he says that we are not in a position to sue for reasonable value because we have used the term 'contract' in the evidence, and have asked for profits, we can say to

lants, McClintic-Marshall Company, Far West Clay Company and E. E. Davis & Company, have instituted this cross-appeal and made and filed herein the following assignments of error (Record, page, 29)):

ASSIGNMENTS OF ERROR.

1. "The court erred in holding that the defendants (Ann Davis and others) co-partners doing business under the name and style of Tacoma Millwork Supply Company, have a valid and subsisting material man's lien upon the real estate and premises described in Paragraph III of said decree, or any paragraph thereof, for the reason that said parties, by their original and amended complaint in intervention and by their other pleadings and by the evidence submitted in support thereof, elected to and did affirm the contract entered into between them and the Scandinavian-American Building Company, and did thereby affirm each and every part of said contract, including the 14th paragraph thereof by the terms of which they expressly waived any and all right of lien whatsoever."

2. This is substantially the same as Number 1.

3. "The court erred in allowing said parties doing business as Tacoma Millwork Supply Company a material man's lien upon the real estate and premises described in paragraph III of the decree, for the reasons that the said claim of lien was based upon a series of contracts constituting a single transaction and one general undertaking, whereunder said parties became and were contractors for the furnishing and installing of certain materials, and that if entitled to any lien at all, said lien should only be of the rank of a contractor's lien."

ARGUMENT AND POINTS OF LAW.

I.

It is our contention that the Appellees were irrevocably bound by their waiver of lien right; and that it was error on the part of the court to allow them a mechanic's lien upon the property in question in any amount whatever.

We are not directly concerned with the personal judgment which the court allowed them against the Scandinavian-American Building Company, but being ourselves lienors, two of us material men of co-ordinate rank with the lien given the Appellees, and one, E. E. Davis & Company, a contractor, a sub-ordinate lienor; for the only recovery will be out of the property and every dollar that goes to the Appellees of such security, proportionately lessens the satisfaction of our claims.

The waiver of lien was express and unequivocal in each one of the various contracts of the Appellees with the Building Company. By the terms of these contracts and by the express statement of the Appellees in their original cross-bill and in their supplemental cross-bill, and by the express terms of each contract, each contract as to all of its parts was itself entire and inseparable. The contracts were

all made and expressly so declared to be by Appellee contemporaneously, as a part of one transaction, and indivisible.

The Appellees sought to avoid the results of this waiver by claiming that they were induced to consent to it by the fraud of the owner of the premises, the other party to their contract, which fraud they did not discover until January, 1922.

We contend then that the Appellees upon the discovery of the fraud were put to the election of either suing upon the contract in damages for the breach thereof, or rescinding the contract entirely, notifying the other party thereof, and suing upon a *quantum meruit.* They could not do both.

But it is apparent from the foregoing statement of the case that the Appellees did nothing of the kind. They attempted to grasp both horns of the dilemma in their pleadings, in their proofs and finally upon the argument on the final submission of the case.

It is true that counsel for Appellees herein when entering its proofs, on being challenged by the Appellants, claimed that it was not relying upon the contract, and submitted proofs of the reasonable value of materials claimed to have been furnished

under the main contract A. Yet, by the form of his pleadings and in the schedules introduced in evidence, he was at all times seeking to recover profits on his contracts at the contract price. (Appellees' Exhibit, record pp. 766 to 773).

Referring to the Record, page 773, is the final summary by Appellees of their claim. Exhibit A was the main contract for manufacturing certain millwork material, on which they claim $58,000 and over, as to which there was some evidence introduced as to its reasonable value. Exhibit B was the contract for certain door bucks for which they claim the sum of $1266.00, this was the exact and entire contract price. Exhibit C was another contract for bank room fixtures for which they claim the entire and exact contract price, $1957.00. Exhibit D was a profit, pure and simple, and so claimed on the $30,000 contract for installing the manufactured material in the building.

Now, each one of these separate contracts was made, by the terms of each contract, and the pleadings and claims of the Appellees just as interdependent as the various paragraphs or provisions of any one contract, upon the other paragraphs and provisions thereof (See cross-complaint of Tacoma Millwork Supply Co., page 210).

(Record, page 173 XVI): "That the contract, Exhibit C, being a contract for the erection of the two several characters of millwork hereinbefore referred to as being manufactured under exhibits A and B attached hereto and made a part hereof, was entered into contemporaneously with the said other or remaining contracts by these, your cross-complainants, and formed and is a part of the consideration entering into the two remaining contracts and was all one and the same transaction, each contract being a consideration for the entry into the other, * * * " The same is repeated in the supplemental cross-bill of the Appellees (Record, page 221). How can it be said then, that the Appellees claiming thus ambiguously on contract A at times as under the contract and at other times as not under the contract, yet claiming distinctly and unequivocally under each of the other three contracts, and a profit thereon at the contract price, have rescinded the contract so as to escape the effect of the lien right waiver?

II.

The right to claim a lien was expressly waived. (See Article XIV of all contracts; Tr. p. 753).

III.

Such waiver is valid.

Holmes vs. C. M. & P. S. Ry. Co., 59 Wash. 293.

Grey vs. Hickey, 94 Wash. 370, at p. 374.

Pacific Lbr. & Tbr. Co. vs. Bailey, 60 Wash. 566, at p. 569.

Seattle Lbr. Co. vs. Cutler, 63 Wash. 662, at p. 665.

Davis vs. LaCrosse Hospital Ass'n., 99 Wash. 351.

Baldwin Locomotive Works vs. Hines Lbr. Co., 125 N. E. 400, 13 A. L. R. 1059 at pp. 1061 to 1062.

Kelly vs. Johnson, 95 N. E. 1068, 36 L. R. A. N. S. 573.

27 Cyc, p. 261, *et seq.*

18 R. C. L., Mechanics Lien, sec. 104.

IV.

The waiver was supported by adequate consideration.

27 Cyc, 263, *et seq.*

18 R. C. L., Mechanics Liens, sec. 104, *et seq.*

Grey vs. Jones, 81 Pac. 813, at p. 814 (Opinion by Judge Bean).

Hughes vs. Lansing, 55 Pac. 95. (Opinion by Judge Wolverton).

Annotation in 13 A. L. R. at p. 1065.

V.

The waiver cannot be avoided by rescision of Article XIV alone.

(a) The contracts are entire and each is expressed to be "not severable or divisible." (See Article I of Contracts, Tr. p. 747).

(b) There can be no partial rescision.

The rule denying partial rescision can hardly be gainsaid. It is in effect admitted, since counsel for these appellees said in the brief submitted to the trial court, "We are familiar with the principle that one cannot ordinarily rescind any part and still get the benefit of the contract."

> "Partial rescision. A rescision must be in *toto*. A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other, unless the two parts of the contract are so severable from each other as to form two independent contracts."
>
> *13 C. J. Contracts,* Sec. 682, p. 623.

> "It is plain that if a party to a contract seeks to avoid it by reason of the fraud or failure of the other party to comply with its terms, he cannot rescind it as to some of its provisions and rely upon it as to others. In order that this lien may be maintained it must appear that the petitioner has substantially performed his part of the contract, and *it must*

further appear that there is nothing in the contract itself which will prevent the establishment of the lien. (Italics ours) * * * If he (the petitioner) was induced to make the contract by reason of the fraudulent representations of Jaspar, on discovery thereof he could have rescinded it as a whole, and have brought an action at law for its breach, or he might have brought an action declaring upon a *quantum meruit* for the value of the labor and material furnished, or he could have availed himself of the remedy provided for the enforcement of a mechanics lien to recover for the value of the labor and materials furnished."

Girouard vs. Jaspar, 106 N. E. 849 (Mass.).

"Appellants (the lien claimants) do not seek to rescind the contract in *toto* and to recover the reasonable value of their services and materials. They do not allege that they were induced by fraud, misrepresentation or mistake to accept the water rights and mortgage, in ignorance of their real character, nor do they, having failed to return the property delivered to them or to allege any reason for their failure to do so, sue for the damage resulting from the difference between that which they received and that which they contend they were entitled to. Having retained this property they must be held to have retained it in full payment of the amount due under the contract, and cannot be heard to say they accepted it in partial payment or on account. *They attempted in this action to avail themselves of the portion of the contract which fixes the amount of their compensation, any they cannot repudiate but must be held to be bound by the provisions thereof, which gave respondents an option to pay with*

water rights and a mortgage instead of money." (Italics ours.)

Bernard vs. Fisher, 177 Pac. 762 (Idaho).

"One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract and sue for his damages; or he may rescind it and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other because a sale cannot be valid and void at the same time."

Stuart vs. Hayden, 72 Fed. 402, at p. 411.

Affirmed in 169 U. S. 1, 42 Law. Ed. 639.

"There can be no doubt that, where a contract is breached, the party injured may pursue one of two remedies: first, he may sue upon his contract and recover his loss of profits; or, second, he may waive the contract and sue upon a *quantum meruit;* but he cannot pursue both remedies, for they bear a different measure of damages. *Gabrielson vs. Hague Box & Lbr. Co.,* 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032. This is no doubt, the general rule."

Grey vs. Hickey, 97 Wash. 278, at 279, 166 Pac. 625.

"When conditions arise which authorize a party to rescind a contract, himself electing whether he will rescind or whether he will pursue his remedies under the contract, since he cannot do both, the remedies being inconsistent;

and the pursuit of either of these remedies is an election which prevents resort to the other."

20 C. J. 6

J. L. Owens Co. vs. Doughty, 110 N. W. 78 (N. D.).

Guild vs. Moore, 155 N. W. 44, at p. 49 (N. D.).

Sherbloom vs. Faussett, 174 Pac. 337 (Wash.)

National Bank vs. Powles, 33 Wash. 21, at pp. 27 and 28.

Cole vs. Smith, 58 Pac. 1086 (Colo.).

Federal Life Ins. Co. vs. Maxam, 117 N. E. 801 (Indiana).

Collinson vs. Ream, 144 N. W. 1050.

Cheney vs. Bierkamp, 145 Pac. 691, at 692 (Colo.).

Walker vs. McMillan, 160 Pac. 1062.

VI.

If a Reformation of these contracts is contended for by Appellees, we have no hesitancy in asserting that there is no ground either in the pleadings or in the proof for such relief. The pleadings count on the contracts and set them out. They allege that these contracts were induced by fraud, but do not claim that the agreements the appellants intended to make were other or different from those actually entered into, and naturally they do not set

out the agreements intended to be made.

"In order to make out a good cause of action (for reformation of an instrument) the bill of complaint or petition should show every element necessary to entitle the complainant to equitable relief, with especial reference to the following: (1) The grounds of reformation; (2) the agreement actually made; and (3) the agreement which the parties intended to make. * * *

Reformation at the instance of a defendant should be made by alleging the mistake and asking affirmative relief by a cross bill, cross petition, or counter claim, and in such pleading the same rules as to the sufficiency of allegations apply as in the case of a bill or complaint. Relief cannot be had, however, without setting up facts upon which the equitable jurisdiction depends."

34 Cyc, Reformation of Instruments, pp. 971 and 977.

"It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party, and fraud or inequitable conduct of the other."

Story's Equity Jurisprudence, 14th Ed. vol. 2, sec. 980.

"If a party demands equitable relief he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction."

Buchanan vs. Harrington, 53 S. E. 478, at 479 (N. C.).

Williston Contracts, Vol. 4, Sec. 1525, p. 2714.

There is no claim in the pleadings that the

writing fails to embody the real agreement, and when it comes to the matter of proof appellants are met, first, by the fact that they expressly disclaimed any attempt at reformation (Tr. p. 694), and, second, by the fact that it is perfectly clear from the evidence that when the formal written contracts were submitted by the Building Company for execution these contracts were examined in detail, every provision was read and their contents fully known. Thereafter the contracts were executed in the shape in which they now appear in evidence as Exhibits 151, 152 and 153. Any claim that they were signed in ignorance of their true terms or by mistake is utterly vain. (See Tr. pp. 707, 714, 693, 695, 696, 698 and 699). The fraud, if fraud there was, was not in the execution of the contract with the Millwork Supply Company, but in the consideration for it, and hence is not such fraud as will give rise to a right of reformation.

> "Fraud to be the basis of reformation of contract must be fraud in the execution thereof."
>
> *34 Cyc, Reformation of Instruments,* 921.

> "The grounds for reformation are mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, and to constitute a good cause of action the grounds upon which it is based must be alleged."
>
> *34 Cyc, Reformation of Instruments,* 974.

"The equitable doctrine of reformation of written instruments is usually applied where there has been a mutual mistake on the part of both parties to the contract, or else where there has been a mistake on the part of one of the parties and fraud in the other."

Story's Equity Juris., 14th Ed., vol. 2, sec. 978.

"Where a writing owing to the fraud of one of the parties and mistake of the other, fails to express the agreement at which they arrived, reformation will be allowed."

Williston Contracts, vol. 3, p. 2714.

"The party alleging the mistake must show exactly in what it consists and the correction that should have been made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. *Beaumont vs. Bramley,* 1 Turn. & Rus., 41; *Breadalbane vs. Chandos,* 2 Myl. & C., 711; *Fowler vs. Fowler,* 4 De Gex & J., 255; *Sells vs. Sells,* 1 Drew. & Sm., 42; *Lloyd vs. Cocker,* 19 Beav. 144. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. *Rooke vs. Kensington,* 2 K. & J., 753; *Eaton vs. Bennett,* 34 Beav., 196. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. *Mortimer vs. Shortall,* 2 Dr. & War., 372; *Sells vs. Sells, supra.*"

Hearne vs. N. E. Mutual Marine Ins. Co., 87 U. S. 490, 22 L. Ed. 397.

"The jurisdiction of equity to reform written instruments, where there is a mutual mistake or mistake on one side, and fraud or unequitable conduct on the other, is undoubted;

but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court. *Fishback vs. Ball,* 34 W. Va. 644; *Shenandoah Valley R. Co. vs. Dunlop,* 86 Va. 346."

Simmons Creek Coal Co. vs. Doran, 142 U. S. 417, at 435; 35 L. Ed. 1063, at 1071.

"Reformation of a contract will not be granted by a court of equity unless there has been a mistake which is mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescission, but not for reforming a contract. Where there has been a mistake of one party, accompanied by fraud or inequitable conduct of the remaining parties, in such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties."

Grieb vs. Equit. Life Assurance Soc., 189 Fed. 498 at 501.

In *Long vs. Abstract Co.,* 158 S. W. 305, the court declared the following doctrine axiomatic, namely:

"That a court of equity will construe and reform a contract so as to express the real intention of the parties thereto, or annul and cancel the same, where it is illegal and void for any reason; yet it will not make a contract for the parties thereto or reform the same except for the purpose of expressing the real intention of the parties."

And in the further course of the opinion said:

> "In the first place fraud is not a ground for reforming a deed of trust, or any other contract for that matter, that I ever heard of. Fraud is a well known ground for the cancellation of a contract, but not for its reformation." (Opinion at p. 308).

Reformation is therefore unavailing to these appellants.

VII.

Under the statutes of the State of Washington and the rulings of its Supreme Court, the appellees were contractors, and not material men, and if entitled to any lien at all, were to be ranked as "contractors" and not as "material men."

Young Men's Christian Association vs. Gibson, 58 Wash. 307;

Architectural Decorating Co. vs. Nichlason, 66 Wash. 198;

Chavelle vs. Island Gun Club, 77 Wash. 304, p. 310.

> "In every case in which different liens are claimed against the same property the court in the judgment must declare the rank of such lien or class of liens which shall be in the following order;—1, all persons performing labor; 2, all persons furnishing material; 3, sub-contractor; 4, the original contractor; and the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; * * * ."

Remington's 1915 Codes & Stat. of Wash., Sec. 1141;

Remington's 1920 Compiled Stats. of Wash., Sec. 1141.

It may be of interest as additional evidence that the questions here urged were raised upon the trial below, to call the court's attention to the record, pages 428 to 434, where it is stipulated (P. 428): "Paragraph II. That this stipulation shall be treated as a pleading by each of the parties hereto in answer or reply to the answer and cross-complaint or answer and counter-claim of each of the other parties hereto, denying the right of each and denying the priority of the lien of each and every one of them, and assuring the priority of the lien of such party hereto over each, any, or all of the liens of the other parties hereto. * * * *" (See also Paragraph III, pages 429 and 430.)

VIII.

Referring again to the trial brief of the Appellees filed in the case and to page 8 thereof, we find in part the following:

"SUIT ON CONTRACT OR QUANTUM MERUIT OR FOR FORECLOSURE OF LIEN—REFORMATION.

Mr. Metzger (Counsel for these Appellants) suggests that we are suing on contract and that such suit we are adopting the terms of the contract

and necessarily adopting or re-adopting the waiver of lien," etc.

(For right to refer to briefs, see Stipulation Record, page 434.)

We apologize for the illogical setting of this point, but this brief is in the hands of the printer for final printing, and time does not permit a re-arrangement.

For the foregoing reasons, we respectfully submit that the decree of the trial court in awarding the Tacoma Millwork Supply Company a lien upon the real property in question in the sum of $4657.50, and $500.00 attorney's fees and interest $360.22 was erroneous, should be reversed and no lien allowed this party whatever—and secondly, if this amount is allowed to stand as a lien, that claimants should be ranked in the class of "contractors" and not of "material men."

Respectfully submitted,

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